

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

A National Broadband Plan for Our Future)

) GN Docket No. 09-51

REPLY COMMENTS OF SUNESYS, LLC

Respectfully submitted,

SUNESYS, LLC

Alan G. Fishel
Jeffrey E. Rummel
ARENT FOX LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339
(202) 857-6000

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SUMMARY

The Commission can significantly advance the deployment and use of broadband services by taking an action that many providers have been requesting for a number of years – namely, imposing a deadline on the issuance of pole attachment permits.

In this proceeding, the Commission has specifically asked, to what extent do pole attachments “stand as impediments to further broadband deployments ...?” And the answer is clear. Delays in the issuance of pole attachment permits have been a long-standing, and tremendous, impediment to the deployment of affordable broadband services. The imposition of a deadline for the issuance of pole attachment permits is not only necessary, it is unquestionably feasible. A time limit is necessary because of the following:

1. There is a gaping hole in the current rules: there is no time limit in the Commission’s rules setting forth the period within which a pole owner has to issue an attachment permit.
2. Timely access to utility poles is critical to the deployment of broadband service – in fact, even the utilities admit that providers need access to poles to provide broadband service.
3. Pole owners have no incentive to issue attachment permits, and in many instances they even have incentives to impede such access.
4. Given these realities, many pole owners take advantage of the gaping hole in the rules by causing tremendous delays in the attachment process.
5. Pole attachment delays completely derail and/or greatly delay broadband deployment, while also harming competition and unfairly tilting the playing field.
6. The interminable delays that undermine broadband deployment will come to an end only if the Commission imposes a time period on the issuance of pole attachment permits.

Moreover, a deadline is certainly feasible given the following:

1. Several states that regulate pole attachments have already adopted pole attachment deadlines, proving that such deadlines are undeniably feasible.

2. Some utilities routinely issue attachment permits promptly, further proving that a reasonable time period can be met.
3. The Commission's cable franchising order supports adoption of a time limit for the issuance of pole attachment permits as well.

The comments of utilities opposing any deadlines establish that they have no effective rebuttal. It is so painfully obvious that a deadline for pole attachments is needed and feasible that the utilities' responses either do not pass the "straight face test," or in some instances effectively admit that deadlines are appropriate and can be reasonable.

For example, all of the utilities' arguments regarding why they claim it would be impossible to comply with a time limit are completely undermined by one simple fact: they are already complying with pole attachment deadlines imposed in a number of states. In addition, utilities completely and conveniently ignore the record before the Commission in its ongoing pole attachment proceeding, which record specifies a plethora of examples of pole attachment delays that harm many companies and the public. While utilities completely ignore the record on this point, the Commission certainly should not.

Moreover, utilities do admit that pole attachment deadlines can be reasonable, pointing to certain states that have enacted deadlines that they claim create a "better balance" of the needs of the parties, or are "reasonable." While Sunesys strongly disagrees that the deadlines need to be anywhere near as long as they are in the states that utilities believe have reasonable deadlines (and Sunesys believes states such as New York and Connecticut have more appropriate deadlines), it is clear that everyone either explicitly or implicitly admits that deadlines can be reasonable.

In short, the promotion of broadband deployment and utilization is far too important to let excessive pole attachment delays continue to undermine much needed progress on the broadband front. A deadline should be instituted as soon as possible.

broadband deployment that do not require use of stimulus funding. By doing so, the Commission will not only advance broadband deployment and utilization in this country, but it will also comply with Congress' clear mandate that the Commission analyze the most effective and efficient mechanisms for ensuring broadband access by all people of the United States.³ Obviously, one of the most efficient means of advancing broadband deployment is to take action that advances such deployment – without utilizing federal stimulus funds.

Second, by asking whether pole attachments stand as an impediment to broadband deployment, the Commission apparently recognizes what numerous providers unfortunately know all too well: delays in the issuance of pole attachment permits are a tremendous impediment to the deployment of affordable broadband services. Numerous commenters in the pole attachment proceeding (the “Pole Attachment Proceeding”),⁴ have described interminable delays in the issuance of pole attachments, which delays have been ongoing for many, many years. The question remains: **How many more years do providers have to suffer through such interminable delays, and their customers either have to wait to receive affordable broadband services or never receive them at all, before the Commission finally does what it is so badly needed and long overdue: place a time limit on the issuance of pole attachment permits?**

³ Id. at ¶ 9.

⁴ WC Docket No. 07-245, Implementation of Section 224 of the Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments. See Section II(A)(4) below for citations to examples of some of the comments in that proceeding describing pole attachment delays.

By imposing such a deadline, the Commission will advance the deployment and use of broadband services, and ensure that the provision of such services is affordable, without the use of stimulus funds (at least in many areas).⁵

II. Imposing a Time Period for Pole Attachment Permits is Both Necessary and Feasible

For the past several years, many entities have proposed what the time limit should be for the issuance of pole attachment permits. A group of entities known as the Broadband & Wireless Pole Attachment Coalition ("BWPA") have proposed very reasonable deadlines, which are attached to Sunesys' initial comments in this proceeding.⁶ Others entities have recommended even shorter deadlines.⁷ But what is abundantly clear, is that a deadline is both needed and feasible, and critical to promoting the deployment of affordable broadband services.

If the Commission does establish a deadline, it will finally put an end to the interminable delays in the issuance of pole attachment permits that have plagued broadband deployment for more than a decade. The Commission frequently discusses the critical importance of broadband deployment, and the need for the Commission to take every step necessary to ensure that all Americans have the opportunity to benefit from such services as soon as possible.⁸ Eliminating pole attachment delays is one such long overdue step the Commission must take to achieve that goal. Without such a time

⁵ In many low income areas, stimulus funding for broadband projects will still be necessary even with the pole attachment relief discussed herein. However, there are numerous areas in which broadband deployment is either non-existent or unaffordable for one reason alone – delays in the issuance of pole attachment permits.

⁶ See Sunesys Comments, GN 09-51 ("Sunesys Initial Comments"), Attachment 1 (June 8, 2009).

⁷ See, e.g., Ex Parte Filing of Fibertech Networks, LLC and Kentucky Data Link, Inc., WC Dkt. 07-245 (April 16, 2009).

⁸ See Sunesys Initial Comments at 5, n. 10.

period, pole attachment delays will continue to drag on for years, with no end in sight to the problem, and thereby continue to undermine the public's need for affordable broadband services.

In the Pole Attachment Proceeding, BWPA demonstrated why the implementation of a deadline for pole attachment permits is badly needed and clearly feasible. Sunesys reiterated these same points in its Initial Comments in this proceeding.

On the other hand, the comments of utilities opposing any deadlines, both in this proceeding and the Pole Attachment Proceeding, establish that they have no effective rebuttal. It is so painfully obvious that a deadline for pole attachments is needed and feasible that the utilities' responses either do not pass the "straight face test," or in some instances such replies effectively admit that Sunesys and BWPA are correct. Set forth below are the reasons why a pole attachment deadline is necessary and feasible (which are more fully described in Sunesys' Initial Comments in this proceeding and in BWPA's submission in the Pole Attachment Proceeding), the utilities' responses to those arguments, and, where necessary, Sunesys' reply to the utilities' responses.

As discussed below, a deadline for the issuance of pole attachment permits is necessary for the following reasons:

1. There is a gaping hole in the current rules: there is no time limit in the Commission's rules setting forth the period within which a pole owner has to issue an attachment permit.
2. Timely access to utility poles is critical to the deployment of broadband service – in fact, even the utilities admit that providers need access to poles to provide broadband service.
3. Pole owners have no incentive to issue attachment permits, and in many instances they even have incentives to impede such access.
4. Given these realities, many pole owners take advantage of the gaping hole in the rules by causing tremendous delays in the attachment process.

5. Pole attachment delays completely derail and/or greatly delay broadband deployment, while also harming competition and unfairly tilting the playing field.
6. The interminable delays that undermine broadband deployment will come to an end only if the Commission imposes a time period on the issuance of pole attachment permits.

As also discussed below, a deadline is certainly feasible given that:

1. Several states that regulate pole attachments have already adopted pole attachment deadlines, proving that such deadlines are undeniably feasible.
2. Some utilities routinely issue attachment permits promptly, further proving that a reasonable time period can be met.
3. The Commission's cable franchising order supports adoption of a time limit for the issuance of pole attachment permits as well.

A. Utilities Cannot Refute that the Adoption of a Time Period for the Issuance of Pole Attachments is Unquestionably Needed

In light of the following indisputable facts, a time period for the issuance of pole attachment permits is clearly needed.

1. There is a Gaping Hole in the Current Rules

There is no time limit in the Commission's rules setting forth the period within which a pole owner has to issue an attachment permit. Pole owners have an uncapped and unspecified period of time in which to issue an attachment permit.

Utility Response: Utilities admit that there is no time limit in the Commission's rules by which a pole owner has to issue an attachment permit, and that pole owners have an uncapped and unspecified period of time in which to issue a permit.

2. **Timely Access to Utility Poles is Critical to the Deployment of Broadband Service**

Broadband providers need access to utility poles to provide their services,⁹ and such access must be provided in a timely manner.¹⁰ As the Commission has recognized, lengthy delays in resolving access issues are “not ... conducive to a pro-competitive, deregulatory environment” and can “delay a telecommunications carrier’s ability to provide service and unnecessar[ily] obstruct the process.”¹¹

Utility Response: Utilities acknowledge that providers need access to utility poles in order to provide broadband services, stating that “electric infrastructure is important ... as a reliable physical network of poles, ducts, conduits, and rights-of-way for the deployment of communications wires and equipment.”¹²

⁹ See, e.g., Comments of Sunesys, LLC, WC Dkt. No. 07-245, at 4 (Mar. 7, 2008) (“Access to utility poles by broadband and telecommunications services is essential to the deployment of such services.”); Comments of Crown Castle, WC Dkt. No. 07-245, at 2 (Mar. 11, 2008) (“Crown Castle’s ability to exercise its Section 224 attachment rights on a timely and economic basis is critical to its ability to deploy DAS networks to provide the best, most viable solution to notorious [wireless] coverage challenges.”); Comments of T-Mobile USA, Inc., WC Dkt. No. 07-245, at 1 (Mar. 7, 2008) (“Pole attachments allow commercial mobile radio service (“CMRS”) providers to expand coverage and maintain service quality to residential customers.”).

¹⁰ *In re: Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, Report and Order*, 13 FCC Rcd. 6777, 6787-88 (¶ 17) (Feb. 6, 1998) (“1998 Pole Attachments Report and Order”) (the Commission “agree[s] with attaching entities that time is critical in establishing the rate, terms and conditions for attaching.”)

¹¹ *Id.* at 6788 (¶ 17). In addition, in the Commission’s May 22, 2009 report to Congress entitled *Bringing Broadband to Rural America: Report on a Rural Broadband Strategy*, the Commission stated as follows: “Timely and reasonably priced access to poles and rights of way is critical to the buildout of broadband infrastructure in rural areas. May 22 Report at ¶157

¹² See, e.g., *Ex Parte Filing of the Edison Electric Institute and the Utilities Telecom Council*, WC Dkt. No. 07-245, 1, n. 3 (April 16, 2009) (“UTC Ex Parte Filing”). See also Comments of Edison Electric Institute and the Utilities Telecom Council, WC Dkt. 07-245, at 12 (Mar. 7, 2008) (“Safe and reliable electric service and competitive communications markets can operate in harmony for the benefit of both electric and communications industries and the public . . .”).

3. Pole Owners Have No Incentive to Issue Attachment Permits, and in Many Instances They Even Have Incentives to Impede Such Access

As the Commission recognizes, a utility's position in a pole attachment negotiation is virtually indistinguishable from that of an incumbent local exchange carrier ("ILEC") in an interconnection negotiation, where an ILEC has "scant, if any, economic incentive to reach agreement."¹³ Thus, at best, utilities have no incentive to issue attachment permits.

Moreover, some pole owners, such as ILECs and certain utilities that provide broadband and other telecommunications services, compete against prospective attachers.¹⁴ Thus, these pole owners have a competitive disincentive to issue attachment permits. Accordingly, pole owners either have no incentive to issue pole attachment permits, or a disincentive to do so.

Utility Response: Utilities Telecom Council and the Edison Electric Institute (collectively, "UTC") argue in this proceeding that "[u]tilities have every incentive to complete make ready, because it is in their interests to ensure that pole attachments are made safely."¹⁵ UTC also claims that utilities are effectively deterred from delaying the process because of concerns a complaint will be filed.¹⁶

¹³ 1998 Pole Attachments Report and Order at 6789 (¶21).

¹⁴ See, e.g., *In re: United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as Information Service*, Memorandum Opinion and Order, 21 FCC Rcd. 13281, 13296 (Nov. 7, 2006) (Adelstein concurring) ("In BPL-enabled Internet access, we have a relative newcomer to the Internet access service market but an exciting technology that has the potential to be a new broadband pipe into the home.").

¹⁵ Comments of Utilities Telecom Council and the Edison Electric Institute, GN Docket No. 09-51, at 18 (June 8, 2009) ("UTC Comments").

¹⁶ *Id.* at 19.

Reply to Utility Response: UTC's arguments lack any merit. As to its first argument, if a utility delays the issuance of a pole attachment, the attachment is not installed unsafely in the interim – it is just not installed at all. Accordingly, utilities do not have an incentive to install attachments in a timely manner to prevent the installation of unsafe attachments. With respect to UTC's second argument, the facts undermine its claim. Not only has the Commission recognized that utilities have no incentive to perform pole attachments, but the stark reality that utilities often interminably delay the process makes that abundantly clear. If utilities were truly concerned about such complaints, they would not cause great delays. Moreover, as no one can dispute, companies rarely have an incentive to help their competitors. So, where an ILEC or utility competes against an attacher, the pole owner actually has a disincentive (as opposed to just no incentive) to issue the permit in a timely fashion.

4. Given these Realities, Many Pole Owners Take Advantage of the Gaping Hole in the Rules By Causing Tremendous Delays in the Attachment Process

Many pole owners fail to issue permits until a year or more after receipt of an application. Commenters in the Pole Attachment Proceeding describe delays reaching a year or more, including, for example, delays of 12 months,¹⁷ 15 months,¹⁸ 16 months,¹⁹ 3 years,²⁰ and 4 years.²¹

¹⁷ Comments of Crown Castle at 7.

¹⁸ Comments of Sunesys LLC, RM-11303, at 11 (Jan. 30, 2006) ("2006 Sunesys Comments").

¹⁹ *Id.*

²⁰ Comments of The DAS Forum, WC Dkt. No. 07-245, at 11 (Mar. 7, 2008).

²¹ Comments of T-Mobile at 7; 2006 Sunesys Comments at 11.

Utility Response: UTC claims that there is no evidence of any delays in the issuance of pole attachments.²² Allegheny Power and a few other utilities (collectively “Allegheny Power”), in a joint filing, claim that the record does not support implementation of a pole attachment deadline.²³

Reply to Utility Response: Both UTC and Allegheny Power completely and conveniently ignore the record before the Commission that specifies a plethora of examples of pole attachment delays, which harm many companies and the public. Pole attachment delays have been ongoing for numerous years, and neither UTC nor Allegheny Power provide any facts whatsoever to contradict that undeniable, and unfortunate, truth. While utilities completely ignore the record on this point, the Commission certainly should not.

5. Pole Attachment Delays Completely Derail and/or Greatly Delay Broadband Deployment, While Also Harming Competition and Unfairly Tilting the Playing Field

Some providers are forced to forego or curtail business because of pole owners’ lengthy delays in connection with pole attachments.²⁴ At a minimum, significant delays in pole attachments greatly delay the provision of broadband services. Moreover, competition is also undermined because ILECs (and electric companies installing facilities for communications purposes) do not need to wait for a license. Even existing attachers have an unfair advantage if new attachers confront interminable delays.

Utility Response: Same as Subsection No. 4 above.

²² UTC Comments at 20.

²³ Comments of the Coalition of Concerned Utilities, GN Docket No. 09-51, Exhibit J, at 17-18 (June 8, 2009), (“Allegheny Power Comments, Exhibit J”).

²⁴ See, e.g., 2006 Sunesys Comments at 11; Comments of Indiana Fiber Works, RM-11303, at 3 (Jan. 30, 2006).

Reply to Utility Response: Same as Subsection No. 4 above.

6. **The Interminable Delays that Undermine Broadband Deployment Will Come to an End Only if the Commission Imposes a Time Period on the Issuance of Pole Attachment Permits**

Utilities have all the bargaining power with respect to pole attachments permits, because they control the necessary facilities. Moreover, given this leverage, the incentives involved, and the long and undeniable history of delays in this area, one thing is certain: the interminable delays will only come to an end if the Commission institutes a time period for the issuance of pole attachment permits.

Utility Response: All pole attachment delays should be addressed through complaint proceedings at the Commission.

Reply to Utility Response: Utilities ignore the fact that the complaint process has been in effect for years, and is still in effect today, and yet the delays persist and are still interminable. The complaint process alone is wholly insufficient. Under the current system, providers simply cannot afford (from both a cost and delay standpoint) to file complaints each time a utility fails to act timely on a pole attachment application. The complaint process does not eliminate the delays – it merely results in further costs and further delays. To say the least, reliance on the complaint process is not the answer.

B. **Utilities Cannot Refute that Imposing A Time Period For Pole Attachments Is Clearly Feasible**

In light of the following indisputable facts, it is clear that adopting a time period for the issuance of pole attachments is feasible.

1. **Several States that Regulate Pole Attachments Have Already Adopted Pole Attachment Deadlines, Proving that Such Deadlines Are Undeniably Feasible**

A number of states, including New York²⁵ and Connecticut,²⁶ have already instituted time periods for the issuance of pole attachments. Not surprisingly, utilities cannot explain how such deadlines are workable in states that have adopted deadlines, but not elsewhere.

In addition, the logic behind the imposition of state-adopted time periods is equally compelling everywhere. As the Connecticut DPUC (90 day deadline, 125 days for pole replacements) stated, a longer time period “is not reflective of today’s customer-driven telecommunications market. Connecticut customers ... deserve the most efficient delivery of services, and thus the process ... must be streamlined.”²⁷ But *all* consumers in the country deserve the efficient delivery of services. Not having a time period under the Commission’s rules is completely at odds with today’s customer-driven market, the Commission’s broadband deployment goals, and the public’s need for these services.

Utility Response: UTC argues that the “fact that some states have adopted deadlines or that some utilities have met these timelines proves nothing about whether the Commission could or should impose such requirements.”²⁸ UTC further argues that any deadline would cause major safety concerns and that deadlines are not feasible because the amount of time it takes to issue an attachment varies depending on

²⁵ See *In re: Commission Concerning Certain Pole Attachment Issues, Order Adopting Policy Statement*, Case 03-M-0432, 2004 N.Y. PUC LEXIS 306 (N.Y.P.S.C. 2004) (“New York Order”).

²⁶ See DPUC Review of the State’s Public Service Company Utility Pole Make-Ready Procedures – Phase 1, *Decision*, Dkt. No. 07-02-13, 2008 Conn. PUC LEXIS 90 (Conn. P.U.C. 2008) (“Connecticut Order”).

²⁷ Connecticut Order at *50.

²⁸ UTC Comments at 19.

certain factors.²⁹ In the Pole Attachment Proceeding itself, UTC does implicitly admit that time limits for the issuance of permits can be reasonable. UTC has argued in that proceeding that “in Utah, a 120-day make-ready [deadline] may represent a better balance” between the ability of the pole owner to complete the work and the need for it to be finished without undue delay.³⁰

Allegheny Power states that while it is true that states such as Connecticut and New York have imposed deadlines on the issuance of pole attachment permits, they did so only after conducting an extensive analysis to ensure that deadlines on the issuance of pole attachments is feasible. Like UTC, Allegheny Power admits that deadlines can be reasonable, pointing to Vermont, which has imposed time limits, as a state that “has established more reasonable deadlines.”³¹

Reply to Utility Response: As discussed above, utilities have effectively conceded that deadlines for pole attachment permits can be reasonable. Moreover, the fact that New York and Connecticut imposed pole attachment deadlines only after a thorough review and analysis to ensure the feasibility of such deadlines simply further establishes that pole attachment deadlines are eminently feasible. In addition, there is absolutely no merit to UTC’s assertion that state-imposed deadlines are irrelevant here, because such deadlines prove both that workable pole attachment deadlines (i) can be established; and (ii) that they do not cause safety problems.

²⁹ *Id.*

³⁰ *Ex Parte Filing of the Edison Electric Institute and the Utilities Telecom Council*, WC Dkt. No. 07-245, at 8 (April 16, 2009).

³¹ Allegheny Power Comments, Exhibit J at 8-9.

While BWPA disagrees that the length of the time periods imposed in Utah and Vermont are necessary (which are the states that UTC and Alleghany Power, respectively, believe have reasonable deadlines), what it appears that everyone agrees to - either explicitly or implicitly - is this: the imposition of time limits for pole attachment permits can be reasonable and feasible. Indeed, given that a number of states have already imposed such time limits, no one can credibly argue otherwise.

In fact, all of the utilities' arguments regarding why they claim it would be impossible to comply with a deadline are completely undermined by a simple fact that they often ignore: they are already complying with the time limits imposed in a number of states.

2. Some Utilities Routinely Issue Attachment Permits Promptly, Further Proving that a Reasonable Time Period Can Be Met

The disparity in the time periods for utilities to grant access to their poles is tremendous. Some utilities provide access within 3 months or less after receiving an application, while others take more than five times as long (i.e., over 15 months), and another utility takes approximately 4 years to complete the work. It does not take 15 months, let alone 4 years, to complete the make-ready necessary for a pole attachment. The difference in these times is not a safety, engineering or reliability issue -- it is a harm to broadband deployment issue, and a very serious one at that.

Utility Response: Utilities admit that some utilities provide pole attachment permits in a timely fashion, but UTC claims this is irrelevant.³²

Reply to Utility Response: The fact that some utilities issue pole attachments in a timely manner just further establishes that it can readily be done.

3. The Commission's Cable Franchising Order Supports Adoption of a Time Limit for Pole Attachment Permits as well

The Commission imposed a time limit for local governments to respond to cable applications because broadband deployment was being delayed, the process sometimes took a year or more, and complaints were not adequate remedies since they added additional delay and expense.³³ Those same findings apply to pole attachment applications. In fact, a stronger case exists for a time limit with respect to pole attachment permits because private entities are causing the delays, rather than local governments who generally want more competition.

Utility Response: None

III. Conclusion

Implementation of a time period for the issuance of pole attachments is unquestionably needed, feasible, and long overdue. Interminable pole attachment delays greatly undermine broadband and wireless deployment, and such delays cannot and should not be tolerated any longer. The promotion of broadband deployment and utilization is far too important to this nation to let excessive pole attachment delays continue to undermine much needed progress on the broadband front. The Commission

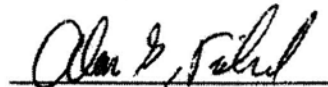
³² UTC Comments at 19.

³³ See generally *In re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (Mar. 5, 2007).

should adopt a deadline as soon as possible. In fact, the extent to which affordable broadband services are offered in many areas will depend on the Commission's decision here.³⁴

Respectfully submitted,

SUNESYS, LLC



Alan G. Fishel

Jeffrey E. Rummel

Arent Fox LLP

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036-5339

(202) 857-6000

Dated: July 21, 2009

³⁴ In the NOI, the Commission has also requested information regarding the best way to attract risk capital to broadband infrastructure projects. NOI at ¶ 37. One of the best ways of attracting investment is by ensuring that any impediments to the deployment and use of broadband are eliminated – and one such long-standing impediment is the interminable pole attachment delays that currently plague the ability of providers to offer affordable broadband services.